REDACTED VERSION OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL AND DECLARATION OF CODY S. HARRIS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	Case No. 5:11-cv-2509-LHK **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

[FILED UNDER SEAL]

I. INTRODUCTION

Plaintiffs have moved to compel Defendants Adobe Systems, Inc., Apple, Inc., Google, Inc., and Intel Corporation (collectively, "Defendants") to produce [redacted] that Plaintiffs learned about solely through court-ordered, mediated settlement negotiations. Plaintiffs concede that the document was not the subject of any discovery request, and they provide no persuasive explanation of why it is relevant to any issue in the case. Instead, Plaintiffs offer speculation regarding [redacted], and a misinterpretation of Federal Rule of Civil Procedure 26. None of these arguments supports reopening discovery and compelling Defendants to produce a confidential settlement-related document with no bearing on any issue to be litigated at trial. The Court should deny the motion.

II. ARGUMENT

A. Plaintiffs have failed to show good cause for the Court to reopen discovery.

1. Plaintiffs never requested [redacted] and agreed that documents created post-litigation are beyond the scope of discovery.

Defendants have no obligation to produce [redacted] because Plaintiffs never requested it in discovery. Plaintiffs served Defendants with three sets of Requests for Production, containing a total of 75 separate requests. Plaintiffs concede that none of them covers [redacted].[1] *See* Pls.' Motion to Compel ("Mot.") at 4. Furthermore, Plaintiffs and Defendants stipulated—and agreed in open court—that Defendants were under no obligation to produce documents created after December 30, 2011. *See* CMC Hr'g Tr. at 7:14-8:6 (April 18, 2012).[2] Plaintiffs now assert they "would have sought its production in discovery, were there a reason to have done so," Mot. at 4,

[1] For this reason, Plaintiffs' citation to [redacted] is inapposite. There, [redacted] was "covered by prior document requests," and also the subject of pending requests filed by newly-joined plaintiffs. [redacted] attached as Exhibit A to the accompanying Declaration of Cody S. Harris in Support of Defs.' Opp. to Pls.' Mot. to Compel. Furthermore, the plaintiffs in [redacted] themselves distinguished between [redacted] *Id.* at 3–4.

[2] "THE COURT: What is that time period? Mr. SAVERI: For the Key D.O.J. custodians, it's – it's December 30th, 2011. THE COURT: That's the end date? MR. SAVERI: Yeah. . . .MR. MITTELSTAEDT: . . . And for the non-D.O.J. custodians, the end date is a year earlier. The end of 2010. MR. SAVERI: Yeah."

but their failure to craft a request covering such a document, and their agreement that documents post-dating the inception of litigation need not be produced, demonstrate otherwise.

2. [redacted] is not [redacted] covered by Rule 26(a).

Knowing that [redacted] has never been requested in this litigation, Plaintiffs try to shoehorn [redacted] into being [redacted]. But Plaintiffs misleadingly quote only part of the rule. *See* Mot. at 3 (truncating Rule 26(a)). The full rule requires disclosure of [redacted] (emphasis added). Rule 26(a) has no bearing here for two reasons. First, [redacted]. Second, even if it could be so construed, Rule 26(a) does not demand the blanket disclosure of [redacted] (emphasis added). [redacted] cannot fall under Rule 26(a). The rule's plain language forecloses Plaintiffs' argument.

B. [redacted] is irrelevant to any issue in this case.

Plaintiffs have identified no issue to which [redacted] is relevant. It has no bearing on any of the challenged conduct and was created in connection with the instant litigation, years after the challenged conduct ended. Its disclosure is unlikely to lead to the discovery of admissible evidence, Fed. R. Civ. P. 26(b)(1), which explains why Plaintiffs never requested any such documents in discovery.

Plaintiffs speculate that [redacted], but offer no explanation of how this might be so. This is a joint-and-several liability case in which Plaintiffs must prove an overarching conspiracy among all seven Defendants. Plaintiffs admit that if they

prevail, "each Non-Settling Defendant will be liable for the acts of all members of the conspiracy." Mot. at 2. There is thus no reason to suggest that [redacted].

In [redacted] ." *Id.* Precisely so here.[3]

Plaintiffs cite [redacted]

[3] Plaintiffs' halfhearted attempt to distinguish [redacted] fails. Mot. at 5 [redacted] didn't address Federal Rule of Evidence 408(b) because that rule has no bearing on [redacted] discoverability or admissibility. Plaintiffs have pointed to no case stating otherwise, and to Defendants' knowledge, none exists.

[redacted]. In contrast, here, [redacted] [redacted][4].

For the same reasons, the Manual for Complex Litigation's discussion [redacted] does not apply here. [redacted].

Courts typically deny discovery [redacted] because they are irrelevant to any issue to be determined at trial. *See* [redacted]. Plaintiffs have provided the Court no reason to reach a different result here.

C. [redacted].

Plaintiffs argue that [redacted]. Mot. at 5. But the cases unanimously hold that

[4] Plaintiffs also rely on [redacted]

[5] Although the defendants in [redacted], the court's reasoning logically extends to [redacted] itself.

[redacted]. Apart from speculation and innuendo, Plaintiffs have made no showing that [redacted].

The Department of Justice has recognized the appropriateness [redacted]. Congress has also concluded that [redacted]. And the ABA's Antitrust Section has reported that [redacted].

Courts have also routinely [redacted].

III. CONCLUSION

[redacted] is a confidential, joint-defense, settlement-related document with no relevance to the issues to be tried in this case. Courts addressing [redacted] in the antitrust context have found them to be [redacted] not discoverable. Plaintiffs' motion should be denied.

[6] The defendants in [redacted]

Respectfully submitted,

Dated: April 15, 2014

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CONCURRENCE

I, Robert A. Van Nest, am the ECF user whose ID and password are being used to file this DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL. In compliance with General Order 45, X.B., I hereby attest that Lee H. Rubin, Michael F. Tubach, David C. Kiernan, and Gregory P. Stone have concurred in this filing.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE ANTITRUST LITIGATION THIS DOCUMENT RELATES TO: ALL ACTIONS	Case No. 5:11-cv-2509-LHK **DECLARATION OF CODY S. HARRIS IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

[FILED UNDER SEAL]

I, Cody S. Harris, declare as follows:

1. I am an attorney licensed to practice law in the State of California and am an associate of the law firm of Keker & Van Nest LLP ("KVN"), counsel for Defendant Google, Inc., in this matter.

2. I have knowledge of the facts set forth herein, and if called upon as a witness, I could testify to them competently under oath.

3. Attached hereto as **Exhibit A** is a true and correct copy of the Reply Memorandum in Support of Plaintiffs' Motion to Compel filed on [redacted], in [redacted]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 15, 2014, in San Francisco, California.

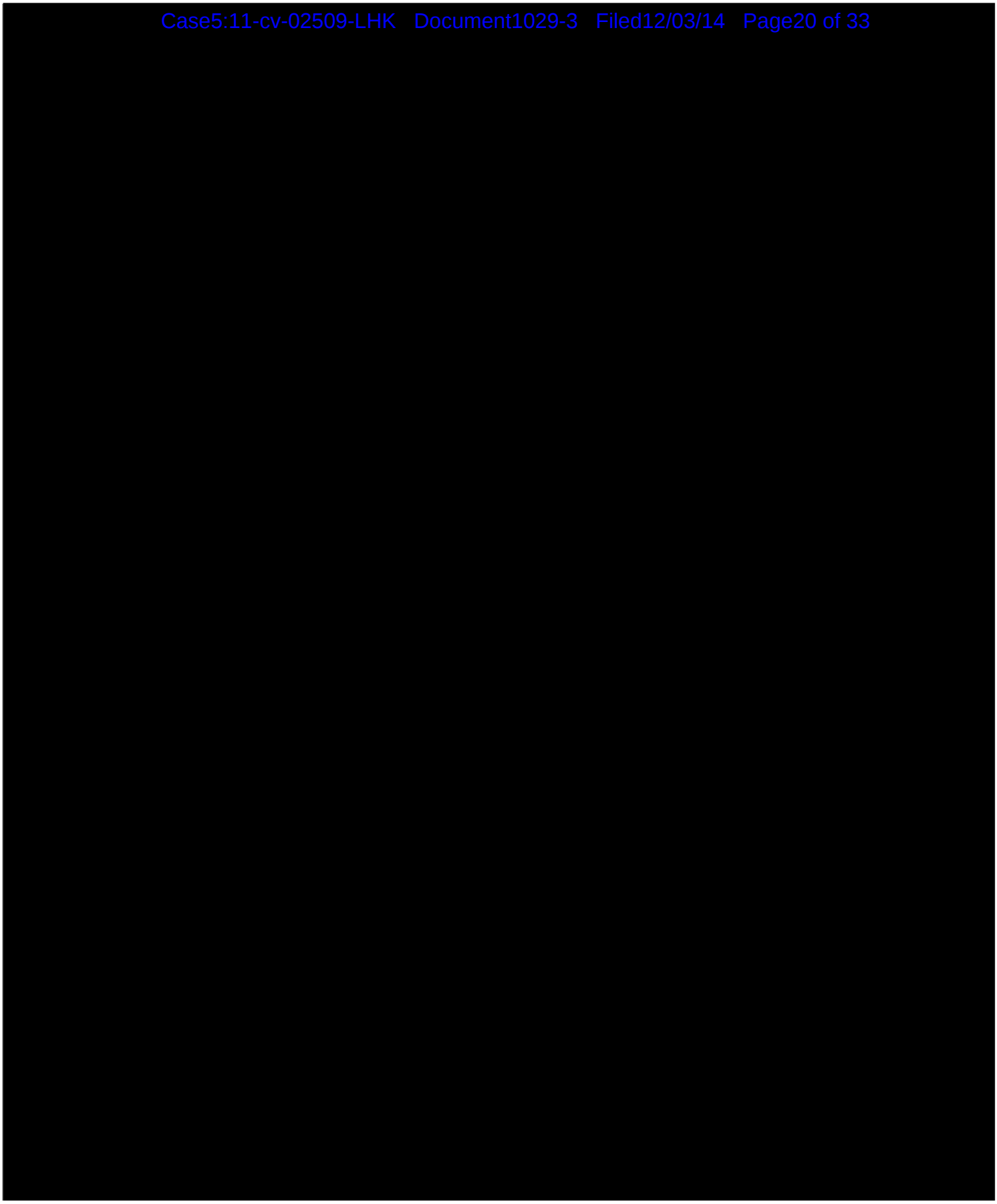
/s/ Cody S. Harris
Cody S. Harris

EXHIBIT A
[FILED UNDER SEAL]

[redacted]

[redacted]

[redacted]



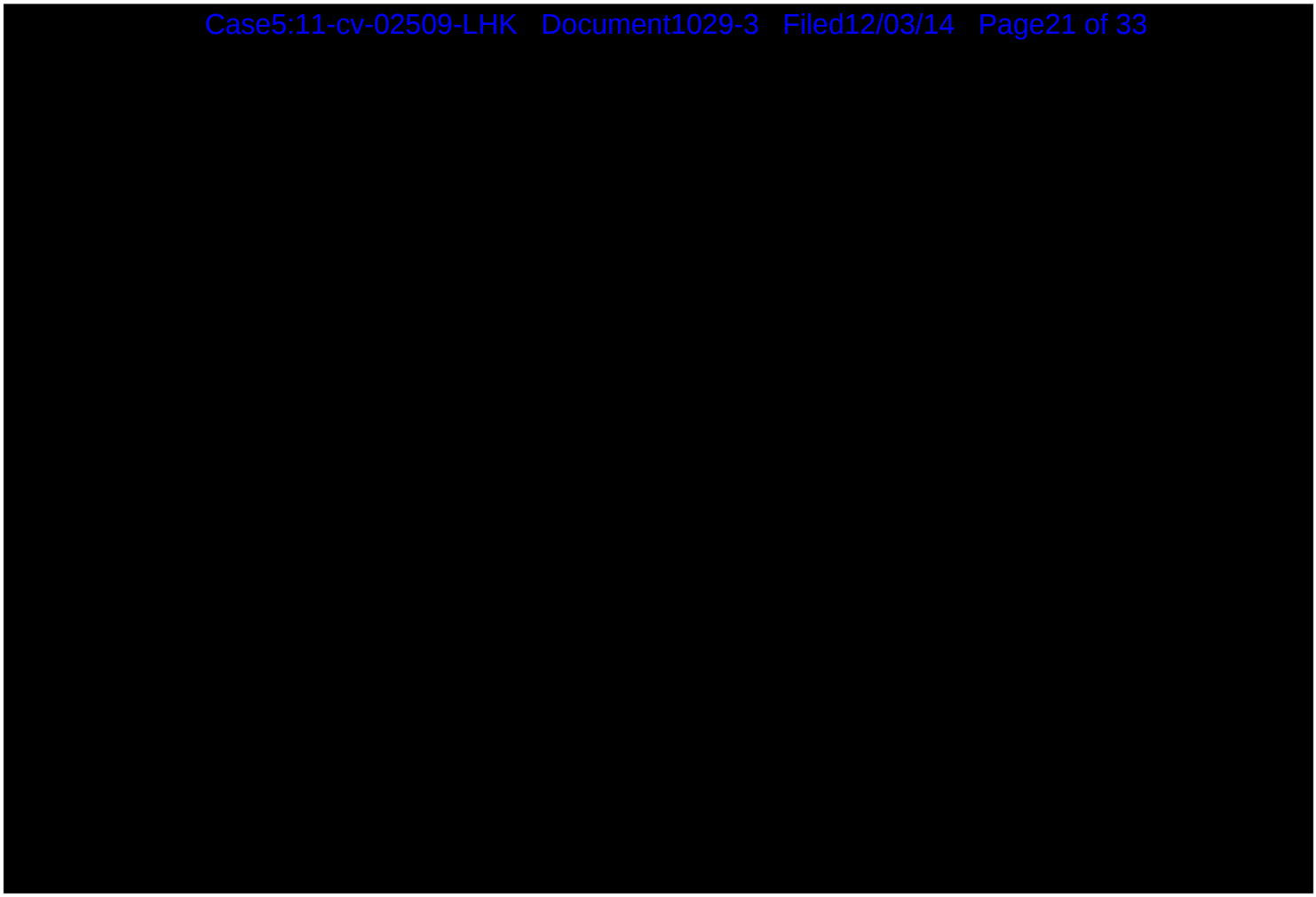


EXHIBIT 1

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]